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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/706,708	11/11/2003	Bryon J. Tarbet		7600

7590 06/28/2004  
Kenneth Tarbet  
1652 Seattle Slew Way  
Oceanside, CA 92057

EXAMINER

LEVY, NEIL S

ART UNIT PAPER NUMBER

1616

DATE MAILED: 06/28/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/706,708	TARBET, BRYON J.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Neil Levy	1616	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 11/11/03.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 27-48 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 46-48 is/are allowed.
- 6) ☒ Claim(s) 27, 29, 31, 33, 34, 37, 40-42 & 45 is/are rejected.
- 7) ☒ Claim(s) 28, 30, 32, 35, 36, 38, 39, 43, 44 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)             | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)    | Paper No(s)/Mail Date. _____  |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____   | 6) <input type="checkbox"/> Other: _____                                    |

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 27, 29, 31, 33, 34, 37, 40, 42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hayes, Jr. et al 5464610 in view of Gans et al 5648389 and Merck '65 Gans et al 5648389 and Murad 6071541 and US 2003/0007939

Hayes provides the instant method (summary), salicylate with barrier topically applied to treat onychomycosis, but fails to add copper and peroxide, vehicles include solvents, plasters, carrier or binders (col. 3, lines 28-33).

Gans also applies topical compositions; of Benzoyl peroxide (col. 2, Summary) with zinc transition metal complexes is carrier. Salicylic acid compounds are also used (col. 3, top) with the zinc complexions, and EDTA (col. 3, lines 10-45). Copper and phenolics are about. Merck shows Copper sulfate (p.993) especially for foot rot treatment, followed by bandaging.

Murad 607' also shows topical administration of the instant salicylic acid or salt compounds with hydrogen peroxide and surfactants, stabilizers and other pharmaceutical adjuvants (col. 3, lines 20-55), for prevention, treatment or management of inflammatory conditions (col. 4, lines 48-61) with poly hydroxy aromatics – tanmicacid, as are Green tea poly phenols (col. 7, lines 64-65). EDTA also is provided (col. 7, lines 15-23).

Murad 2003/ also treats topically, inclusive of nails [0032] with antifungal (0035) compounds of poly phenol benzoyl peroxide, aspirin (0067) and zinc EDTA compliers (0062).

It would have been obvious to a person or ordinary skill in the art at the time the invention was made, desiring to utilize a topical composition to control fungus to use one of Hayes, modified as shown by secondary references to provide advantageous adjuvants with the salicylate compounds each utilize, in order to provide optimum efficacy.

The primary reference, teaches, the essence of the instant invention as claimed, but does not specify each and every element of the instantly claimed Methods. However, the secondary references directed at the similar same methods and compositions to solve the same problem of the primary reference do provide these additional elements.

All the critical elements of the instant invention are disclosed.

The selection of each ingredient is a result effective parameter chosen to obtain the desired effects. It would be obvious to vary the nature of each ingredient to optimize the effects desired such as desired number of applications, length of time for desired protection, ease of handling, degradation, for example, and the use of additives for the functionally for which they are known to be used is not a basis for patentability.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 45 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

There is no antecedent in 27 for the carrier.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Neil Levy whose telephone number is (571) 272-0619. The examiner can normally be reached on Tuesday through Friday 7 AM to 5:30 Pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Thurman Page can be reached on (571) 272-0602. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Levy/LR  
June 23, 2004

NEIL S. LEVY  
PRIMARY EXAMINER